

No. 22,494

IN THE

United States Court of Appeals

For the Ninth Circuit

M. AUSTIN DICKINSON,

*Appellant,*

vs.

LEWIS J. COCHRAN, District Director  
Internal Revenue and Customs, A  
Postpaid Internal Revenue Agent,

*Appellees.*

On Appeal from the Judgment of the United States  
District Court for the District of Alaska

BRIEF FOR THE APPELLEES

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M. ASHLEY DICKERSON,

*Appellant,*

VS.

LEWIS J. CONRAD, District Director,  
Internal Revenue and CHARLES A.  
POHLAND, Internal Revenue Agent,

*Appellees.*

On Appeal from the Judgment of the United States  
District Court for the District of Alaska

**BRIEF FOR THE APPELLEES**

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**OPINION BELOW**

The District Court's opinion (I-R. 76-78) has not yet been officially reported.

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**JURISDICTION**

Taxpayer's complaint was filed on September 13, 1967. (I-R. 1.) The Government's motion to dismiss was filed on September 28, 1967 (I-R. 30), and was granted by the court's judgment of dismissal entered

on November 13, 1967 (I-R. 79). Notice of appeal was filed on November 17, 1967. (I-R. 80.) This Court's jurisdiction is based on 28 U.S.C., Section 1291.

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### QUESTIONS PRESENTED

1. Whether, prior to issuance of an Internal Revenue summons, a taxpayer can successfully maintain an action to enjoin Internal Revenue Service officials from requesting the taxpayer to furnish information and to allow inspection of his records in the course of investigating the taxpayer's correct tax liability.

2. Whether the District Court had jurisdiction to grant taxpayer's prayer that appellees be enjoined from conducting an investigation of the accuracy of her tax returns.

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### STATUTES INVOLVED

Internal Revenue Code of 1954:

SEC. 7421. PROHIBITION OF SUITS TO RESTRAIN  
ASSESSMENT OR COLLECTION.

(a) [as amended by Sec. 110(c), Federal Tax Lien Act of 1966, P.L. 89-719, 80 Stat. 1125] *Tax.*—Except as provided in sections 6212(a) and (c), 6213(a), and 7426(a) and (b)(1), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed.

\* \* \* \* \*

(26 U.S.C. 1964 ed., Sec. 7421.)

SEC. 7602. EXAMINATION OF BOOKS AND WITNESSES.

For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized—

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

(26 U.S.C. 1964 ed., Sec. 7602.)

SEC. 7605. TIME AND PLACE OF EXAMINATION.

(a) *Time and Place.*—The time and place of examination pursuant to the provisions of section



7602 shall be such time and place as may be fixed by the Secretary or his delegate and as are reasonable under the circumstances. In the case of a summons under authority of paragraph (2) of section 7602 the date fixed for appearance before the Secretary or his delegate shall not be less than 10 days from the date of the summons.

(b) *Restrictions on Examination of Taxpayer.*—No taxpayer shall be subjected to unnecessary examination or investigations, and only one inspection of a taxpayer's books of account shall be made for each taxable year unless the taxpayer requests otherwise or unless the Secretary or his delegate, after investigation, notifies the taxpayer in writing that an additional inspection is necessary.

(26 U.S.C. 1964 ed., Sec. 7605.)

28 U.S.C.:

§ 1340. *Internal revenue; customs duties*

The district courts shall have original jurisdiction of any civil action arising under any Act of Congress providing for internal revenue, or revenue from imports or tonnage except matters within the jurisdiction of the Customs Court.

§ 2201. [as amended by Sec. 111, Act of May 24, 1949, c. 139, 63 Stat. 89]. *Creation of remedy*

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration



shall have the force and effect of a final judgment or decree and shall be reviewable as such.

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### STATEMENT

Taxpayer's complaint (I-R. 1-6) alleged that the action arose under the Fourth and Fifth Amendments to the Constitution, under 28 U.S.C., Section 1340, and under certain sections of the Internal Revenue Code of 1954, namely, Sections 6510(c)(1) and (2),<sup>1</sup> 7602, and 7605(d).<sup>2</sup>

Taxpayer alleged "a conspiracy between the Defendants and other parties unknown to Plaintiff"<sup>3</sup> to harass taxpayer with accusations of "improper filing of her taxes." (I-R. 1-2, par. III.) The complaint further alleges that taxpayer was required to re-file a Form 941 (I-R. 2, par. IV) and that she paid an additional tax on an amended return (I-R. 3, par. VII) the nature of which is not particularly stated. Paragraph VIII (I-R. 3) alleged that the sole aim of the appellees in this harassment "is for the purpose of bringing a criminal prosecution against Plaintiff, and making Plaintiff incriminate herself in violation of her rights under the Fifth Amendment," and "to

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<sup>1</sup>Section 6501, relating to limitations on assessment, was evidently the intended reference.

<sup>2</sup>Section 7605(b), relating to unnecessary examinations, was evidently the intended reference.

<sup>3</sup>In her brief (p. 6) taxpayer names members of the Grievance Committee as persons engaged in a concerted action to destroy her practice and convict her of crime.

force Plaintiff to violate the attorney-client privilege.” Taxpayer also alleged in Paragraph VIII that the agents “have threatened that if Plaintiff did not voluntarily give them this information, that they would force her to give it to them through the issuance of subpoenas.” (I-R. 3-4.)

The nature of the stated harassment was alleged in Paragraph IV as the acts of “certain revenue agents” in coming to taxpayer’s office for copies of Form 941, and in later paragraphs as coming to her office “to try to coerce her into applying \* \* \* [a] fee to a tax liability of another person” (par. V), calling her office “demanding certain records” and waivers (par. VI), and “trespassing on her premises despite the fact that she has asked them not to come.” (par. VII). (I-R. 2-3.)

The complaint alleged that taxpayer feared that the agents “will thus violate her constitutional rights under the Fourth Amendment, etc.” (I-R. 4, par. VIII.)

Taxpayer identified herself as a female and a Negro. (I-R. 1, 4, pars. II, VIII.)

The following relief was demanded (I-R. 5):

WHEREFORE, Plaintiff prays that an injunction issue from this Court enjoining the Defendants from further molesting, harassing or intimidating Plaintiff, or demanding any records from her, or forcing her in any way to assist them in the preparation of a criminal charge against her, or coming about her premises for any purpose, at any time.

A motion for a preliminary injunction (I-R. 7) accompanied the complaint and on September 26, 1967, taxpayer filed a memorandum in support thereof (I-R. 21-25). This memorandum alleged that the appellees had made a "request to be allowed to 'quarter' themselves in Plaintiff's very small office seizing any record they so desire." (I-R. 21.) Attachments to the memorandum consisted of communications from taxpayer to the District Director requesting an extension of time to file her 1966 return (I-R. 26, 28) and communications from the District Director to taxpayer dated April 11, 1967 (I-R. 27), and September 8, 1967 (I-R. 29). The letter of April 11, 1967 (I-R. 27), referred to a prior phone conversation and outlined information which the taxpayer was to supply by July 10, 1967. The requested data related, inter alia, to "bunched income" and "regular fees," and requested information as to the names of clients and services performed. The District Director's letter of September 8, 1967 (I-R. 29), stated that taxpayer's 1964, 1965 and 1966 returns had been selected for examination and that Revenue Agent Pohland would be at taxpayer's place of business at a certain fixed time to examine taxpayer's books and records relating to those years. Taxpayer was requested to call Agent Pohland if the time and place specified for the examination were not satisfactory.

The appellees filed a motion to dismiss (I-R. 30-31) and in opposition thereto taxpayer filed an affidavit which, in addition to enlarging on allegations of animosity toward her, alleged (I-R. 55):

My name is M. ASHLEY DICKERSON and I am the plaintiff in this suit. I have paid all taxes due, or claimed to be due, from me by the United States. At no time has any tax demand been made of me of any sum in addition to what I have already paid. My suit on file here is not one to enjoin the United States from collection or assessment of a tax. I would welcome their giving me the benefit of the law and serving on me a written demand for any tax which they claim I owe as in that case. I would then have the right of appeal to the Tax Court of the United States.

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#### **SUMMARY OF ARGUMENT**

Taxpayer made no showing of oppressive conduct or of acts by the Internal Revenue Service officials in excess of their statutory duty and authority to determine taxpayer's correct tax liability. She is free to refuse their inquiries and requests and will have an adequate remedy at law in the event the appellees issue an Internal Revenue summons and apply to the District Court for enforcement. In the absence of a substantial controversy as to the appellees' authority to investigate taxpayer's correct tax liability, the District Court has no jurisdiction of an action to enjoin the Internal Revenue Service officials from their investigation.

## ARGUMENT

## I

## THE DISTRICT COURT CORRECTLY DISMISSED TAXPAYER'S COMPLAINT BECAUSE IT STATED NO CAUSE OF ACTION WARRANTING AN INJUNCTION

Having sifted taxpayer's allegations, the District Court's opinion reduced the controversy to the following elements (I-R. 77-78):

It is apparent from the record that the Secretary, through the District Director, has attempted to exercise the investigatory power given him under Section 7602, and that the plaintiff has declined to respond. The District Director, if he desires to pursue the matter, must issue a summons to plaintiff as provided by statute. Plaintiff then may challenge the summons on any basis available to her. If the challenge is there rejected and compliance still refused, the District Director is empowered to enforce the writ in the district court under Section 7402(b).<sup>4</sup>

Therefore, this action is neither timely nor plaintiff's proper remedy. If she wishes to challenge the investigation of her tax returns on any of the grounds or for any of the reasons alleged in her complaint, she must follow the correct procedural steps. She is afforded "complete protection" if and when a summons issues, compliance is refused, and the summons is sought to be enforced.<sup>5</sup>

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<sup>4</sup>*Reisman v. Caplin*, 375 U.S. 440, 446 (1964); *Accord, Kennedy v. Coyle*, 352 F. 2d 867 (7th Cir. 1965); *Lesser v. United States*, 230 F. Supp. 817 (E.D. N.Y. 1964).

<sup>5</sup>See *United States v. Powell*, 379 U.S. 48 (1964); *Reisman v. Caplin*, *supra*; *Kennedy v. Coyle*, *supra*; *Zamaroni v. Philpott*, 346 F. 2d 365 (7th Cir.), *cert. denied*, 382 U.S. 903 (1963); *Mag-*



Taxpayer shows no intrusion on her privacy which she cannot control by withholding consent. The alleged "quartering" of agents on her premises is shown to be nothing but a tentative appointment for an agent to examine taxpayer's records in her own office, with an invitation to taxpayer to suggest an alternative time and place. To what extent she may lawfully resist an Internal Revenue summons must await the event of the issuance thereof. Taxpayer has supplied no allegations and specified no statute which indicates that appellees might lack authority to determine her tax liability for the years in question.

The trial court's disposition seems inescapable in view of *Reisman v. Caplin*, 375 U.S. 440, 446, which held that a taxpayer has an adequate remedy by virtue of his right to invoke judicial review of the Commissioner's demands when the latter applies to the District Court for an order enforcing an Internal Revenue summons. Other cases emphasizing the taxpayer's adequate remedy at law are *Kennedy v. Coyle*, 352 F. 2d 867 (C.A. 7th), and *Campbell v. Guetersloh*, 287 F. 2d 878 (C.A. 5th). While *Zamaroni v. Philpott*, 346 F. 2d 365 (C.A. 7th), certiorari denied, 382 U.S. 903, based denial of injunctive relief primarily on the jurisdictional basis, the court also stated (p. 366):

\* \* \* collateral determination of the admissibility of evidence in an administrative tax proceeding or investigation is not a proper sphere for in-

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*nus, Mabee & Reynard, Inc. v. United States*, 311 F. 2d 12 (2d Cir.), cert. denied, 373 U.S. 982 (1962); *In Re Turner*, 309 F. 2d 29 (2d Cir. 1962); *Campbell v. Guetersloh*, 287 F. 2d 878 (5th Cir. 1961).

junctive intervention in the exercise of equitable jurisdiction.

Taxpayer's reliance on the constitutional privileges guaranteed by the Fourth and Fifth Amendments, and the attorney-client privilege, does not, at this preliminary stage, enlarge her right to relief. Courts of Appeals have uniformly ruled that the *Escobedo* and *Miranda* cases (*Miranda v. Arizona*, 384 U.S. 436; *Escobedo v. Illinois*, 378 U.S. 478) do not bar non-custodial interrogation of taxpayers. *Rickey v. United States*, 360 F. 2d 32 (C.A. 9th), certiorari denied, 385 U.S. 835; *Kohatsu v. United States*, 351 F. 2d 898 (C.A. 9th), certiorari denied, 384 U.S. 1011. *Selinger v. Bigler*, 377 F. 2d 542 (C.A. 9th), certiorari denied, 389 U.S. 904. As to the attorney-client privilege, this Court in *Baird v. Koerner*, 279 F. 2d 623 noted the general rule that the client's identity is not privileged but that special circumstances might create an exception. No special circumstances whatever are suggested by taxpayer in this case and, if there be such, their development is the proper function of a summons enforcement proceeding in the District Court. Cf. *Frank v. Tomlinson*, 351 F. 2d 384 (C.A. 5th), certiorari denied, 382 U.S. 1028 (attorney whose tax liability is under investigation must reveal names of clients).

Taxpayer appears to be contending for an immunity from inquiry and investigation far beyond any protected right. Her extreme contention makes apropos the opinion in *Giancana v. Hoover*, 322 F. 2d 789, 790 (C.A. 7th):



The courts will not assume to supervise and direct the manner in which members of the executive department shall proceed to perform their responsibilities. That would be an unwarranted interference and intrusion upon the discretion vested in this case, for instance, in the director of the Federal Bureau of Investigation.

Whether official inquires are inconvenient, annoying, or oppressive is a highly subjective matter and injunctive relief is generally withheld in deference to the legal remedy. Annotation, What Constitutes Official Oppression, 83 A.L.R. 2d 1007; *Forster v. Manchester*, 410 Pa. 192, 189 A. 2d 147, 151, 152 (no injunction against surveillance of tort claimant); cf. Annotation, Right of Action for Damages Due to Debt Collection Methods, 55 A.L.R. 971, 106 A.L.R. 1453. But where the official seeks judicial assistance to enforce his writ or inquiry, the citizen is entitled to plead that his action exceeds a lawful scope. *Shasta Minerals & Chemical Co. v. Securities & Exch. Com'n*, 328 F. 2d 285 (C.A. 10th). Taxpayer in this case has prematurely sought relief against official action well within the lawful scope of the District Director's authority.

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## II

NO SUBSTANTIAL CONTROVERSY EXISTS AS TO THE AUTHORITY OF THE APPELLEES TO INVESTIGATE TAXPAYER'S CORRECT TAX LIABILITY AND THE DISTRICT COURT WAS WITHOUT JURISDICTION TO ENJOIN THEM FROM PURSUING THE INVESTIGATION

The trial court did not reach the issue of its jurisdiction to enjoin appellees from investigating tax-

payer's correct tax liability. However, appellees submit that Section 7421(a) of the Internal Revenue Code of 1954, *supra*, applies and supplies an independent reason to affirm the judgment below. Taxpayer in no way pleads the facts necessary to avoid the bar of Section 7421, namely, that the Government could in no circumstances ultimately prevail and that taxpayer has no adequate remedy at law. *Enochs v. Williams Packing Co.*, 370 U.S. 1. The bar of Section 7421 applies as well to investigation of tax liability as to assessment and collection. *Campbell v. Guetersloh*, 287 F. 2d 878 (C.A. 5th). Taxpayer's attempt to anticipate questions relating to admissibility of evidence is also subject to the bar of Section 7421. *Zamaroni v. Philpott*, 346 F. 2d 365 (C.A. 7th).

In *DeMasters v. Arend*, 313 F. 2d 79, petition for certiorari dismissed, 375 U.S. 936, this Court held (p. 84) that where a "substantial controversy" was presented as to the Commissioner's power to examine tax years barred save for fraud, jurisdiction was conferred by 28 U.S.C., Section 1340, *supra*, to entertain an action for an injunction. But appellant here shows no plausible reason why the Commissioner lacks authority to inquire into her correct tax liability.

Lastly, 28 U.S.C., Section 2201, *supra*, barring declaratory judgments with respect to taxes, should be noted. Though taxpayer does not appear to request it, such relief was included in the caption of her complaint. (I-R. 1.)

**CONCLUSION**

For the reasons set forth above the judgment of the District Court should be affirmed.

Respectfully submitted,  
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April, 1968.

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**CERTIFICATE**

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Dated, San Francisco, California,  
April 17, 1968.

RICHARD L. CARICO,  
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